VALIDITY AND CORRECTNESS IN KELSEN'S THEORY OF LEGAL INTERPRETATION

I. Legal interpretation in Kelsen's work.

Notwithstanding its clear connection with some central aspects of the pure theory of law, legal interpretation has a secondary role in the writtings of Hans Kelsen; in fact, it is controversial if he develops a theory of legal interpretation at all[1]. He certeinly does not in an usual way, that is, as a province of the general theory of law referred to the different methods or arguments of interpretation, their logical structure or presuppositions[2]. Kelsen's thesis on legal interpretation can be better understood as a critic of the traditional conception –represented by the *Begriffsjurisprudenz* or *L'École de l'exégèse*– according to which the one right answer is to be reached through interpretation[3]. On the other hand, he also explicitly rejects the decisionism of the *Freirechtschule* or the *American legal realism*.

Kelsen's basic ideas on legal interpertation are, on the one hand, its characterisation as a hybrid with both cognitive and volitive elements, due to the partial indeterminacy of law; and, on the other hand, the relationship between legal interpretation and the structural properties of the legal system, i. e., the dynamic principle and the stepped construction of legal order. It is, precisely, because of this connection with the dynamic conception and the hierarchical structure of legal systems –both features that the pure theory of law never abandones– that the theory of legal interpretation is one of the issues that has suffered less modifications, if any, in the context of Kelsen's works[4]. In any case –as the periodization question seems unavoidable[5]– we could speak of an evolution, not in the main thesis on legal interpretation, but in the comprehension of the consecuences that the volitive or decisionist element would project in the overall construction, which deeply determines the evolution of Kelsen's thought[6].

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[1] According to Stanley Paulson, Kelsen actually has no theory of legal interpretation (Paulson, 1990a: 137). In the other hand, the theoretical frame of the pure theory of law itself, that is, the positive law as object of knowledge, restricts the development of such a theory (Mayer, 2001: 98).

[2] Luzzati (1995: 88); Mayer (2001: 95-6).

[3] Walter (1983: 188). Kelsen's rejection of the traditinal doctrine has not only a theoretical basis, as this doctrine ignore the volitive element that operates in every act of adjudication, but also ideological, as it hides this element, pretending that every act of adjudication has a cognitive nature.

[4] Luzzati (1990: 123); also, Bulygin (1995: 12) and Ruiz Manero (1990: 94). Chiassoni distinguishes two periods in Kelsen's theory of legal interpretation: the first one, named *naive dualism*, begins in 1911, with the *Hauptprobleme*, and extends up to 1934, when the second period, named *critic dualism*, begins. Then, his oppinion is similar to that of Luzzati, Bulygin or Ruiz Manero.

[5] See, among others, the debates of stanley Paulson with Mario Losano (vid. Paulson, 1985; 1990a; 1990b; 1990c y Losano, 1985; 1990) and, more recently with Carsten Heidemann (vid. Paulson, 1998; 1999 y Heidemann, 1997; 1999).

[6] Paulson (1990a: 140). However, Paulson differentiates three periods within Kelsen's theory of legal interpretation: a first one, that extends from 1911 to 1934; a second one, characterized by the distinction between volitive and cognitive elements in legal interpreteation, due to the partial indetermination of law, that is up to the 50's; and a third and last period, in which the balance between cognition and will desappears (Paulson, 1990c: 178-80).

This connection with the structural aspects of the pure theory of law also expains that some ideas on legal interpretation can be traced back to early texts, as the *Allgemeinestaatslehere* of 1925, in which Kelsen presents a complete and systematic exposition of the dynamic conception of legal system. In questioning the classical distinction between *legis latio* and *legis executio* as typical functions of two different state authorities, those of legisaltive and judicial, respectively[7], Kelsen is diminishin the importance of the opposition between creation and application of the law[8]. In this period of Kelsen's thought, the idea of indetermination of law is barely developed, though it is already implicit in some way. According to the hierarchical structure of the legal system law creation is a process of determination in which each step, that is, each act carried out by a state authority is an act of application and, simultaneously, an act of creation of law, due to the partial indetermination of law. If we accept that every act of application of law is, at the same time, an act of creation of law, it seems that the presence of volitive elements in legal interpretation is also to be admited.

Since its formulation in the writings of 1934[9], Kelsen's thesis on legal interpretation have remained unchanged (and are well known):

1) "Interpretation is an intellectual activity that accompanies the law-creating process as it moves from a higher level of the hierarchical structure to the lower level governed by this higher level"[10].
2) "In governing the creation of the lower-level norm, the higher-level norm determinates not only the process whereby the lower-level norm is created, but possibly the content of the norm to be created as well"[11].
3) "This determination, however, is never complete"[12].
4) "Indeterminacy can be directly intended, that is, can be part of the intention of the authority issuing the higher-level norm"[13]; or indeterminacy "can also be the unintended consequence of properties of the norm to be applied by the act in question"[14].
5) Because of the indeterminacy, "the norm to be applied is simply a frame within wich various possibilities for application are given, and every act that stays within this frame, in some possible sense filling it in, is in conformity with the norm"[15].
6) "From the standpoint of the positive law, however, there is no criterion on the basis of which one of the posibilities given within the frame of the norm to be applied could be favoured over the other possibilities (…) there is simply no method according to which only one of the several readings of a norm could be distinguished as 'correct'"[16].

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[7] And, therefore, the classical doctrine of the separation of powers (Kelsen, 1925: §37).
[8] Kelsen (1925: §33).
[9] Kelsen (1934a), that reproduces what had been advanced in "Zur Theorie der Interpretation" (Kelsen, 1934b).
[10] Kelsen (1934a: 77).
[11] Kelsen (1934a: 78).
[12] *Ibid*.
[13] *Ibid*.
[14] Kelsen (1934a: 79).
[15] Kelsen (1934a: 80).
[16] Kelsen (1934a: 81).

7) "The necessity of an 'interpretation' arises precisely because the norm to be applied –or the system of norms– leaves open various possibilities, which is really to say that neither the norm nor the system of norms provides a decision (…). This decision (…) is left instead to a future act of norm creation"[17].
8) "[I]t is a function of will to arrive at the individual norm [lower-level norm] in the process of applying a statute, provided that the frame of the general norm [higher-level norm] is filled in thereby"[18].
9) As a corolary, two uses of 'interpretation' must be distinguished. The first one refers to a process of identification of all possible meanings of a statement, that is to say, the frame defined by the legal norm; this is the *scientific* interpretation. The second one refers to the decision of a legal authority that makes one of the possible meanings of the norm to become binding; this is the *authentic* interpretation. The first one is a pure cognitive activity; the second one is an act of creation of law according to the dynamic principle.

Kelsen claims to position himself halfway between the thesis of the one right answer, that conceives interpretation as an act of pure knowledge, on the one hand, and radical skepticism, that defend the volitive nature of law application, on the other hand; in other words, between cognitivism and decisionism. Legal (*authentic*) interpretation comprehends, according to Kelsen, both, cognitive and volitive elements: the *identification* of the frame defined by the higher-level norm, that partially determines the act of application / creation of law, and the *decision* of one of the possible interpretations within the frame in which the higher-level norm can be concretized. This balance, nevertheless, does not maintains, destabilizing to the decisionist side, when connecting Kelsen's ideas on legal interpretation with other aspects of his theory.

It is the case of legal science. As Paulson has pointed, the claim to present scientific interpretation as the discovery of all, or at least, the greatest number of possible meanings of a normative statement (norm), is not only an utopian proyect, as his own commentar of the United Nations Charter shows[19]; as they all are legally equivalent, general norms lack of any capability of prediction or have it very limited from the point of view of legal science[20]. Considering that higher-level norms state a frame of possible meanings, that is, a multiplicity of possible lower-level norms, what does it mean that legal science *describe* valid norms? According to the later, the statements of legal science would be formulated as follows: "The (higher-level) norm N comprehends the norm N_1 according to the meaning A; the norm N_2 according to the meaning B; the norm N_3 according to the meaning C, …"[21].

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[17] Kelsen (1934a: 82).
[18] Kelsen (1934a: 83).
[19] Paulson (1990a: 146).
[20] Paulson (1990a: 150)
[21] Guastini (1989: 123). Guastini has shown up the general incompatibility of Kelsen's theory of legal science and his theory of legal interpreattion. First of all, Kelsen do not even mention the problem of interpretation when addressing the question of legal science. Nevertheless –points out Guastini– the later presupposes the former, "since the identification and description of norms *stricto sensu* requires interpretation (at least "pragmatic" interpretation in view of deciding whether a given sentence expresses either a norm or a statement)" (Guastini, 1995: 109). In second place, Kelsen do not distinguishes between normative statements (sentence) and norms (meaning);

Legal science statements would be just a list or an enumeration of possibilities, not even of probabilities. The practical relevance of legal science is still more attenuated if we consider its distance from legal praxis, as Kelsen admits that an authentic interpretation that goes beyond the limits –the frame– stablished by the scientific interpretation can be a valid act of application / creation of law[22].

Other problems raise with other parts of Kelsen theory. Due to his skepticism regarding legal methods of interpretation –what is not, but an extension of his ethical eskepticism– Kelsen has been described as irrationalist, given that the equivalence among these methods of interpretation from the point of view of positive law prevent from rational justifying the arrival to a final decision. Nonetheless, it seems to me that this accusation does not alter in essence Kelsen's mid position regarding legal interpretation. It is in relation to the problem of irregular norms that the solutions propposed by Kelsen seems to bring his theory closer to an extreme decisionism, moving him away of the mid point irretrievably.

Yet, there are some elements that allows a less irrationlist reading of Kelsen's ideas. In what follows I will analize two aspects of his thesis on legal interpretation: the problem of indeterminacy and the problem of the validity os legal norms.

II. The problem of indeterminacy.

Kelsen maintains that every legal act that applies a norm is only partially determined by that norm, therefore, every act of norm application implies a moment of discretion. This indeterminacy can be intended or not. In the first case, indeterminacy is "part of the intention of the authority issuing the higher-level norm"[23]. Kelsen provides with two examples. The first one refers to a health law that prescribes that "upon outbreak of an epidemic the residents of the affected city are to take certain precautions to prevent the disease from spreading". In this case, "administrative agencies are empowered to determine these precautions in various ways depending on the various diseases"[24]. The second one is that of a criminal law that "provides for a fine or a gaol sentence for a specified delict", where "the judge is left both todecide in favour of ine sanction or the other and to

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in Guastini's opinion, scientific interpretation enumerates the posible meanings of normative statements; the different norms conteined in theses statements: norms are the result, not the object of interpretation; and, in any case, this list cannot be a deontic statement, as Kelsen claims (Guastini, 1995: 110-1), unless they are just a mere repetition of norms; "actual juristic deontic sentences cannot be understood as scientific statements. They can only be understood as proporsals of just one interpretation among the variety of interpretations which a norm-formulation allows for" (Guastini, 1995: 111); in such a case, scientific interpretation would not be a cognitive activity, but political. Other critical considerations point in the same direction: according to Kelsen, the statements through which legal science expresses itself are not mere descriptive statements, but, given the cognitive function of legal science, they are neither prescriptive statements, but statements of a third class, that is, the "descriptive ought statements". In Ruiz Manero's opinion, these type of statements are not distinguishable of mere prescriptions, therefore Kelsen is not succesfull in construing this category (Ruiz Manero, 1990: 56).

[22] Chiassoni (1990: 72).

[23] Kelsen (1934: 78).

[24] Kelsen (1934: 78-9).

determine its severity, for whcich determination an upper and a lower limit may be established in the statute itself"[25].

On the other hand, unintended indeterminacy is a consequence of the properties of the norm to be applied. Kelsen mentions three sources of unintended indeterminacy: "First of all, there is the ambiguity of a word or a phrase used in expressing the norm; the linguistic sense of the norm is not univocal, and whoever is going to apply the norm is faced with several possibilities. The same situation exists where the organ applying the norm believes that a discrepancy between the linguistic expression of the norm and the will of the norm-issuing authority can be assumed. (…) Finally, indeterminacy of the prescribed legal act can result from the fact that two norms purporting to be simultaneously valid –both contained, say, in one and the same statute– contradict one another wholly or in part"[26].

There is another source os indeterminacy that has nothing to do with the intention of the authority issuing the higher-level norm or the properties of the norm, but with legal conventions (methods, arguments) on interpretation. As Kelsen himself points out, "[t]he different methods of interpretation may establish different meanings of one and the same provision. Sometimes, even one and the same method, especially the so-called grammatical interpretation, leads to contradictory results"[27]. This indeterminacy, say, comes not from above.

The notion of indeterminacy suffers itself from ambiguity, being able of, at least, two interpretations. The first one is a *linguistic* interpretation of indeterminacy; according to this, indeterminacy is a property of language and, therfore, a linguistic property of norms (i). The second one is a *legal* interpretation of indeterminacy; according to this, the notion of indeterminacy refers to the structural properties of legal systems, that is, hierarchy and dynamicity; for this interpretation indeterminacy does not refer to norms, but to acts of application / creation of norms carried out by the authorities (ii).

(i) If the notion of indeterminacy is interpreted in a linguistic sense, Kelsen thesis is not sufficiently founded. As Ruiz Manero has pointed out, Kelsen thesis implies the following: "first, that norms to be applied *always* have (that is, *all* of them and in *every* case of application) a indeterminacy margin; second, that it is not possible, *in any case*, to avoid that margin by means of *second level* norms, that is, by means of directives on interpretation of *first level* norms"[28]. Leaving aside intentional indeterminacy[29] (wanted by the authority that issue the norm that expressly confers the lower authority certain power of decision), the list of sources that generate unintentional indeterminacy is not exhaustive, so that "asuming the existence of cases in which there can be more than one answer within the set of applicable norms, does not mean that there are also cases for which there is only *one* solution within the set of applicable norms"[30]. In short, according to this critic,

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[25] Kelsen (1934: 79).
[26] *Ibid*.
[27] Kelsen (1949: xiii).
[28] Ruiz Manero (1990: 27).
[29] The two examples of intentional indeterminacy provided by Kelsen make no reference –in contrast to Hart– to the possibility that indeterminacy may be obtained through language properties, be it ambiguity or vagueness (Lifante, 1999: 68). Nonetheless, there are no reasons to think that Kelsen excludes this source of intentional indeterminacy.
[30] Ruiz Manero (1990: 28).

Kelsen is not fully aware of the fact that indeterminacy is a contingent property of legal norms.

But, Kelsen's failure in founding the indeterminacy thesis does not mean that this is wrong. It could be argued –as Bulygin does– that there always exist some unavoidable vagueness degree, when particular facts are related to words[31]. In contrast to the former position, this second linguistic interpretation of the notion of indeterminacy presents indeterminacy as a necessary property of norms. According to this, Kelsen simply missed the target in justifying the thesis, but not in its heart.

(ii) The notion of indeterminacy can also be non linguistically interpreted. Based on Kelsen's own texts, some authors[32] have rejected that his thesis is to be understood as if there were no right answer in some cases or the application of norms is never a deductive operation. So Kelsen:

> "Interpreting a statute, then, leads not *necessarily* to a single decision as the only correct decision, but *possibly* to a number of decisions, all of them of equal standing (measured solely against the norm to be applied), even if only a single one of them becomes, in the act of the judicial decision, positive law"[33].

The fact that there is not *necesarily* a single decision do not exclude that there is one; at the same time, that interpretation leads *possibly* to a number of decisions does not mean that this necessarily so. We cannot conclude from Kelsen's text that he rejects the existence of clear cases; thus, the notion of indeterminacy do not always make reference to the fact that a norm is suitable of various interpretations. In other words, indeterminacy do not refer exclusively to a linguistic property of norms, but to a distinctive feature of legal systems. Mayer points out in this direction when affirming that it is necessary to clearly distinguish indeterminacy between a lower normative level and a higher normative level, on the one hand, and indeterminacy in the application of a general norm, suitable of more than a single interpretation[34]; the first one is a legal question regarding the hierarchical structure of legal systems and the dynamic principle ruling its functioning, the second one is a linguistic question regarding the open texture of ordinary language, that is, the existence of easy (or paradigmatic) and hard cases in the use of concepts. Acording to this interpretation, the kelsenian notion of indeterminacy has to do with the first meaning.

Luzzati has developed a more sofisticated approach. According to him, indeterminacy (*Unbestimmtkeit*) is obviously a distinctive feature of legal systems

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[31] Though admiting Kelsen's justificatory deficits, Bulygin, nevertheless, finds quite sound the indeterminacy thesis: "The reason why the individual norm created by the judge is never completely determined by general norms is that general norms are always expressed in a language that contains general terms (predicates), whereas the judge has to decide a particular case; so his problem is the subsuntion of certain particular facts under the predicates contained in the legal rules (general norms)" (Bulygin, 1995: 14). See also Paulson (1990a: 143-4) and Caytas (2012: 14).

[32] Walter (1983: 190-1); Mayer (2001: 100-1). According to Walter, Kelsen vehement attacks against the traditional doctrin of the one right answer have lead to the wrong conclusion of considering hima as a decisionist; a conclusion –says Walter– that cannot be obtained from Kelsen own texts. As we will see, those who arrive to this conclusion have more convincing arguments than this one.

[33] Kelsen (1934: 80).

[34] Mayer (2001: 102-3).

and not a semantic or linguistic notion[35]. As it is well known, the existence of a norm depends on it being created by an act of a legal authority in accordance with a higher-level norm. The point here is not as much the necessity of the normative act, but the fact that the higher-level norm is determined through this act. Therefore, indeterminacy has to do with the *discretion* of legal authorities when deciding how to apply the higher-level norm. Luzzati's approach is based on the following argments. First of all, Kelsen do not consider indeterminacy a property of legal norms, but of the acts that apply the law, hence indeterminacy is not comparable to vagueness (though it could be a consequence of it in some cases) and it is of legal nature[36]. Secondly, Kelsen maintains an unitary concept of indeterminacy refering to the margin of discretion (which diminishes as we descend to the lower levels of the legal system) of every act of application / creation of law[37]. Finally, the distinction between intentional and non-intentional indeterminacy (that is, between normative and factual indeterminacy), seems to confirm that Kelsen refered to discretion and not to vagueness as intentional indeterminacy means the explicit empowerment of certain authorities with a margin of decision that is not a consequence of the linguistic properties of norms. On the other hand, even if it largely dependes on language, non-intentional indeterminacy do not always have a linguistic nature, as Kelsen's enumeration of possible sources of this kind of indeterminacy shows[38].

In my opinion, this approach is succesful showing that the kelseninan notion of indeterminacy is a broader notion than that of open texture or vagueness, but defective in constructing a unitary notion of indeterminacy[39]. If identified with *discretion*, the notion of indeterminacy is such an abstract concept that it would refer to quite different things such as: an express delegation of a power of decision; a factual delegation implicit in linguistic indeterminacy; not to follow the letter of the norm as the interpreter doubts that the will of the authority that issued the norm is accurately reflected in the text; or even the necessity of a decision, that is, a normative act of application / creation of which depends the validity (existence) of the norm. Certainly, all these cases can be described in some sense as discretion, but there are relevant differences that would justify a greater precision, specifically between those cases in which the lower authority can determine the content of the norm and those in which this authority can only decide if or when it carries out the normative act that creates the (lower) norm, but lacks any margin of decision regarding the content of the norm. In the later case, we can only speak of indeterminacy in a very broad and, often, trivial sense. This attempt to reconstruct an unitary notion of indeterminacy is easy to understand if we connect, first, the dynamic principle, acording to which every norm is contained (but at the same time is still indetermined) in a higher-level norm, and therefore a normative act of creation by the empowered authority is

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[35] Luzzati (1990: 125).
[36] Luzzati (1990: 130).
[37] Luzzati (1990: 133).
[38] Luzzati (1990: 136). In fact, language in intentional indeterminacy examples is not vague; on the contrary, it is an express delegatoin of a power of decision whose terms are clearly stablished. This is not the case of legal standars, as the "do not expressely delegate power to the courts to decide freely the cases that are submited to them, but reflect social and ethical rules. Moreover, vague rules confer a merely implicit and factual discretion, not a discretion explicitly recogniced by law" (Luzzati, 1990: 136).
[39] Vid. Lifante (1999: 77-8).

needed for it to be valid, that is to say, for that norm to exist; and second, Kelsen's skepticism about the methods of interpretation and legal argumentation. It is not difficult to obtain an image of legal dinamics as a sequence of normative acts of creation that always and in every case present a margin of discretion and lack of any rational criteria for decision and control[40]. Nevertheless, the ambiguity of the notion persists, as there are two concepts of discretion that should be distinguished, that refering to the margin of decision and that refering to the empowerment to decide.

Anyway, and accepting that Kelsen could have been more precise here, no argument endangers his mid-position in the range of theories of legal interpretation. This conclusion will not be easy to maintain in the next section.

III. The problem of validity.

a) Formal validity and material validity.

According to the dynamic principle, a norm is valid if the act that creates it is in accordance with the provision of a higher-level norm. As the later determinates not only the process whereby the lower-level norm is created, but possibly the content of the norm to be created as well *formal* (refering to the authority and the procedure) and *material* (refering to content) conditions of validity must be differenciated.

Regarding material validity, a norm is in accordance with the higher-level norm if its content circunscribes to the set of possibilities of execution or application described by the later. It is in this sense that Kelsen defines the norm as a "frame" (*Rahmen*)[41]. But, if any, which are the boundaries of this frame? The metaphor of the frame expresses the rejection to cognitivist theories of legal interpretation that support the one right answer thesis, showing that every normative act of aplication contains a moment of discretion (thesis of indeterminacy), as there is always a plurality of possible answers. Nonetheless, the idea of the frame goes further: independently of the practical difficulties involved in determining the boundaries of the frame, the very notion of material validity of a norm rest on the presupposition that there is a set of meanings that fit into the boundaries of the frame[42]; that is, the idea of the frame means that interpretation of the higher-level norm is subject to criteria of correction. Only when the interpretation of a legal authority stays within the frame defined by the higher-level norm, can it be said to be a normative act of application. The frame is, therefore, the cognitive element of interpretation.

Inmediately, a connection between the idea of the frame and legal sicence arises. Leaving aside the margins of discretion explicitly established by higher-level norms (intentional indeterminacy), that also define the boundaries of the frame, it seems clear that the frame is not only defined by the general linguistic uses, but also by all those interpretations based on the application of current interpretative conventions in the legal community. Precisely, it is the identification of this multiplicity of meanings what results from scientific interpretation.

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[40] Lifante (1999: 78).
[41] Kelsen (1934a: 80).
[42] Paulson (1990a: 148).

Nonetheless, Kelsen expressely admits that authentic interpretation can differ from scientific interpretation[43]. By this, two questions arises that undermine the cognitive element: first, the scarce relevance of legal science from the point of view of the pure theory of law (in contrast to sociological approaches); and, second and more signifcant, the fact that the authentic interpretation exceeds scientific interpretation is not due to the incompleteness of the later –something that con be only admited partialy or in particualr cases, but not as a general rule– but just to the will of legal authorities.

This volitive element is even clearer in the next text:

> "By way of authentic interpretation, that is, the interpretation of a norm by the legal organ applying it, not only can one of the possibilities be realised that are brought out by the cognitive interpretation of the norm to be applied, but also a norm can be created that lies completely outside the frame represented by the norm to be applied"[44].

Here, the reference to scientific interpretation is substituted by a more general reference to the cognitive interpretation. This is an important shift as it refers not to the subject of interpretation, but to the very nature of the act. The emphasis lays not in the dissociation of legal science and legal praxis, but in the dissociation of the cognitive element that logicaly preceeds the volitive elements in authentic intepretation.

The cognitive element consist in the set of objective meanings *given* to the interpreter –as it is the object of an act of knowledge, not an act of will– on the basis on currently accepted interpretative conventions, such as rules of use of (ordinary) language, legal methods, equity or any other convention that rules legal interpretation. When an authority produces a norm exceeding the frame defined by the higher-level norm, it is ignoring the set of objective meanings deriving from these rules. In other words, a normative act do not fulfill material conditions of validity when this act cannot objectively be interpreted as observing of any of these interpretative conventions. To be outside the frame means to ignore any rule, principle or standard, in short, interpretative convention identifiable as such; it means to ignore meaning normativity on which material justification of a normative act of creation of law rests. We would say then that the normative act is a pure act of will, that is, an act of mere creation, but not an act of application of law.

Nevertheless, in providing an answer to the problem of the conflict of norms of different hierarchical level (irregular norms), Kelsen admits that conformity to content of the higher-level norm, that is, to stay within the frame defined by that norm, is neither sufficient nor necessary condition for the validity of the lower-level norm. Does this mean the irrelevance of what has been said thus far? This conclusion seems to me to be unsound, though not completely unjustified. However, I find a promising line of argument in a non reductionist interpretation of the concepts of *correctness* and *validity* and a funtional (non ontological) interpretation of the content relation between norms of different hierarchical levels. In what follows I will analyse the problem of irregular norms and its consequences for the kelsenian theory. In the next section I will try a

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[43] "Authentic interpretation may even attribute to a legal norm a meaning which a non-authentic interpretation could never dare to maintain. That is to say, by authentic interpretation a legal norm may be replaced by another norm of totally different content" (Kelsen, 1949: xv).

[44] Kelsen (1960: 354).

reconstruction of Kelsen ideas according to his initial intuition on legal interpretation.

b) The tactit alternative clause.

It is a fact that there are general and individual norms whose content is not in accordance with a higher-level norm (unconstitutional statute, illegal regulation, judicial decisions or administrative acts contrary to statute or regulation), but are valid, according to positive law. These anomalous aspects of legal reality, that affect both, validity of norms (that cannot be explained anymore as the norm creation in accordance with the provisions established by the higher-level norm) and coherence of legal systems (threatened by the existence of two contradictory norms), are difficult to accommodate into the internal logic of the kelsenian model of legal system[45]. Kelsen's answer –the so-called tacit alternative clause doctrine– is well known and a very controversial one:

> "If , for example, an unconstituional statute is possible –that is, a valid statute that either in the manner of its creation or in its content fails to conform to the provisions of the prevailing constitution– this can only be interpreted in one way: the constitution aims not only for the validity of the constitutional statute, but also (in some sense) for the validity of the 'unconstitutional' statute. Otherwise one could no speak of the 'validity' of the latter at all. That the constitution does aim for the validity of the so-called unconstitutional statute is shown in the fact that it prescribes not only that statutes should be created in a certain way and have (or not have) a certain content, but also that if a statute was created other than in the prescribed way or has other than the prescribed content, it is not to be regarded as null and void, but is to be valid until it is invalidated by the designed authority –say, a constitutional court– in a procedure governed by the constitution"[46].

And follows:

> "The meaning of the higher-level norm that provides for the creation and the content of a lower-level norm cannot be comprehended without taking account of the further provision made by the higher-level norm for the case in which its first provision is violated. Thus, the determination of the lower-level norm by the higher-level norm has the character of an alternative provision here (…). If the individual norm corresponds to the first of the alternatives, it is complete, adequate, on the mark; if it corresponds to the second of the alterntives, it is inferior, falling short of the mark, that is, it can be overturned owing to the claim of its deficiency"[47].

With an answer of this kind, both problems seem to be solve at once: the lower-level norm whose content do not correspond to what is explicitely provided by the higher-level norm is not an unlawful norm, but an objectively valid norm according to the alternative implicit provision; the same reason stands for disolving the conflict –logical contradiction– between norms. Thus, the very concept of "unlawful norm" is alien to Kelsen's view: according to the positive law

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[45] For some authors this is a unsurmountable problem; v.g. Weyland: "Kelsen often pursued irreconcilable aims. This is particularly true of his treatament of conflicts of norms at different levels of the hierarchy, which constitutes one of the most puzzling and controversial aspects od his theory. The inconsistencies in this case arise from the incompatibility between his desire to construct a logically coherent model of legal systems and his attempt to fit into certain anomalous aspects of legal reality" (Weyland, 1986: 249).

[46] Kelsen (1934a: 72).

[47] Kelsen (1934a: 74).

one cannot speak of "unconstitutional laws" or "unlawful final judicial decision" (when no more appeals are availible); an *ab initio* invalid norm is a non existent norm (a no-norm); there are only valid or invalidatable norms, that is, valid as long as the competent authority do not declare it void. This "declaration" –says Kelsen– has not a mere declarative, but a constitutive character[48]. Because of this constitutive character it cannot be dismissed that a legal authority declares invalid a norm that conforms with the higher-level norm. In short, a norm is valid (or invalid), if it has been declared valid or has not been declared void by the competent authority.

The formulation of a doctrine like that of the tacit alternative clause in the context of Hans Kelsen's work has been explained in different ways. On the one hand, it has been said that it is a necesary element of Kelsen's theory considering the neo-kantian *epistemological* presuppositions[49]. This doctrine has also been explained in pragmatic terms emphasizing the *functional* dimension of law: its contribution to social peace and certainty[50]. A third explanation is a *conceptual* one: according to Bulygin, this is based in the ambiguity of the concept of validity[51]. With "validity" Kelsen describe three different properties of legal norms: the norm *creation* according to the provisions of a higher-level norm (also identified with membership of the norm to the legal system); the specific *existence* of the norm; and, finally, the *binding* character of the norm. Due to this ambiguity all meanings of validity are considered to be co-extensive and the problem of invalid norms appears as a contradiction: norms that do not conform to the provisions of a higher-level norm, but, at the same time, binding norms as long as the competent authority do not declare it invalid. As he did not differentiate between these two different concepts of validity, the way of explaining the binding character of these norms, and in addition solve the logical contradiction, is to maintain against to all appearances the conformity of these norms with higher-level norms by means of the alternative provision. The mistake lays in that a norm that do not belong to the legal system can be binding, as is is the case of foreign law or derogated norms[52].

The tacit alternative clause doctrine has, at least apparently, devastating consequences for Kelsen's theory[53]. Firstly, it "deprives all general norms of their normative character, for they become tautologous: whatever the course of action chosen by the judge, it always conforms to the general norm applied, so a general norm cannot –for reasons of logic alone– be violated or infringed"[54]. Secondly, and as a consequence of the former, legal norms become trivial, for normative acts creating general or individual norms are not determined in their content by higher-level norms. And, finally, the distinction between "invalidatable norms" and "non existing norms" is completely obscured, for the implicit and almost unlimited openness of the alternative provision do not allows to consider the cases of non existing norms as cases not foreseen by law, as there is nothing that prevents from considering those cases comprehended in the alternative provision. Anyhow, for these reasons, critics consider that the whole theory of the legal system as a

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[48] Kelsen (1960: 277).
[49] Luzzati (1995: 98).
[50] García Amado (1996: 231 y ss.).
[51] Bulygin (1991: 363).
[52] Bulygin (1995: 18-9).
[53] Vid. Nino (1985: 32 y ss.); Weyland (1986: 256); Ruiz Manero (1990: 67); Bulygin (1995: 17).
[54] Bulygin (1995: 17).

dynamic normative system, as well as the idea of law as a technique for social order, collapse, and, al the same time, that Kelsen fall into an extreme decisionism[55].

IV. A non irrationalit interpretation.

Considering what has been said up to here, the relations between norm content and norm validity are as follows:

1) As norms are the meaning of an act of will, the mere correspondence with the provisions of a higher-level norm is not a *sufficient* condition for its validity; a normative act of application / creation of the higher-level norm is necessary for the lower-level norm to be valid, that is to say, to exist.
2) Owing to the tacit alternative clause doctrine, validity is not a contingent property of norms, but an *a priori*[56], thus correspondence of content

[55] Ruiz Manero (1990: 65), Bulygin (1995: 17). Taking into consideration these consequences, some authors have proposed different solutions that could fit in Kelsen's theory. Following the disambiguation of the concept of validity made by Bulygin, Nino maintains that it is possible invalid norms to be binding. Unlike Kelsen, Nino's solution is characterized by the following elements: 1) the norms that "grant validity to the unconstitutional or illegal enactments do not *authorize* those enactments –which is what created some paradoxical implications– but merely declare that there is an *obligation* to apply and to observe the resulting statute"; 2) "these norms are not *necessary* components of every legal system. They are only *positive* and *contingent* parts of some systems, though generally the have not been explicitly enacted but are rather generated in a tacit and customary way"; and, 3) "norms which oblige the application of illegal enactments generally discriminate between laws, contrary to Kelsen's thesis. In adition to negative conditions like that of not being declared unconstitutional by the corresponding court, the norm in question must satisfy a certain positive condition. I think that the implicit positive condition which is generally required is quite vague but nevertheless real and operative: the norm in question should enjoy a certain "*color or appearance of legality*"" (Nino, 1995: 227).

Also Weyland tries to solve this problem otherways, close to the realist factual concept of validity: "Once we admit that Kelsen's concept of the legal system cannot incorporate everything that has the appearance of being valid, prescriptive statements which do not satisfy Kelsen's conditins of validity and yet have legal effects, must be deemed to be part of a wider notion of positive law and a different term must be used to describe them. I propose to call them 'norms in force' and define them as prescriptive statements which are deemed to be binding by legal officials because they have been issued by individuals who appear to be acting in the capacity of legal organs even though they have not complied with one or more norms that regulate their behaviour. Norms in force are more likely to be declared invalid or to fall into *desuetude* than valid norms. If notwithstanding their invalidity they become efficacious and the *opinione necessitatis* required by Kelsen for the formation of customary law is present, they then become part of the legal system on the grounds that custom is a valid method of law creation" (Weyland, 1986: 268).

Actually, both alternatives rest on the distinction of the various concepts of validity that the kelsenian notion comprehends. Nino's proporsal differentiate between validity as binding force and validity as conformity to the provisions of the higher-level norm (that is, as authorization and as membership to the legal system), in order to show that the first domain is wider than the second, as some norms oblige to obey and to apply invalid (not authorized) norms. While Weyland differentiate between validity as existence and validity as conformity to the provisions of the higher-level norm; her wider notion of positive law means nothing but the greater extension of the first domain which includes valid norms as well as those non valid norms that are deemed to be binding by legal officials due to their appearance of legality.

[56] Bulygin (1991: 365).

with the higher-level norm is neither a *necessary* condition for the lower-level norm to be valid: as long as the norm is not declared invalid by the corresponding authority, it is valid.

3) Even an obective valid norm, that is, a norm which content corresponds to the provisions of a higher-level norm, can be declared invalid by the corresponding authority. Then, the correspondence of content with the higher-level norm does not *warrant* validity.
4) Validity of general and individual norms depends on the decision of the corresponding authority. Being this a final decision, it is constitutive.

As we have already mentioned, not only an unwanted decisionism, but also the collapse of the whole theory of legal system (dynamic principle) and the idea of law as a technique for social order obtains from all this. This outlook seems to displace legal interpretation to irrelevancy. Nevertheless, I think that a less catastrophic and less irrationalist (may be, more charitable also) reconstruction of Kelsen ideas is possible resting on his initial intuitions on legal interpretation. Firstly, the validity of a norm and the fact that it is *a* correct interpretation (not *the* correct) of the higher-level norm must be clearly distinguished; in other words, a non reductionist interpretation of the concept of validity must be made. And secondly, the relation of parcial (un)determinacy is to be understood not in an ontological, but a functional and pragmatic way.

Keslen's solution to the problem of conflicts of norms at different hierarchical levels favors the factual upon the normative, by means of recognizing validity to unlawful norms. The alternative, that is, to deny legal status to those norms, is not viable from the point of view of the pure theory of law. In the other hand, there are good reasons for considering valid a norm that do not conform with the provisions of the higher-level norm. Social conflicts and controversies cannot be subject to permanent revision; a definitive solution in a reasonable period of time is a necessary condition for the law to fulfill its social function of contributing to social peace and certainty[57]. But, of course, this does not mean that any final decision, independently of its content, is correct (or a correct interpretation of the higher-level norm). The constitutive character of final decisions regarding the validity of norms should not obscure this point. Legal authorities have the last word, but are not infalible. As Bulygin says, these decisions "are not constitutive in the sense that they make empirical or normative sentence true (…) they are constitutive only in the sense that they constitute conditions for the application of other norms"[58]. In other words, the court's opinion is a sufficient condition for the validity of a norm, but not a standard of correctness.

It is at this point where Kelsen's ideas on legal interpretation play a relevant rol. The distinction between interpretations within the frame and interpretations beyond it, presuppose a standard of correctness that defines two non co-extensive domains from this particular perspective. On the contrary, as a result of the normative emptiness of legal validity through the tacit alternative clause, the domain of "legally valid" entities is potentially co-extensive to that of "factual" decisions of legal authorities, as any norm, general or individual, is valid, independently of its content, as long as the corresponding authority does not

[57] Bulygin (1995: 22); Luzzati (1995: 96).
[58] Bulygin (1995: 24).

declare it void. This asymetry between legal correctness and legal validity is justified by law social functions, that is, social peace and legal certainty, but it is not necessary to reduce legal correctness to legal validity for the law to fulfill these functions.

As it has been said, the frame defined by the norm to be applied is a normative concept whose content depends on the interpretative conventions (methods, principles) of the legal community. According to these conventions not every interpretation falls within the frame. Indeed, they can lead to opposite interpretations –and in fact they do– owing to their potentially conflictive character. This just shows that two or more interpretations are correct from the point of view of the positive law, but, at the same time, that legal correctness does not mean correctness *tout court*. Difficulties establishing the limits of the frame[59], or the fact that these limits are the result of the argumentative strategies of the authorities or the parts in a legal process[60] are not enough strong objections as to abandone the idea of normativity in legal interpretation.

Other objection could be addressed against its scope or amplitude, which is something clearly different to its vagueness. Indeed, as a standard of legal correctness, the frame is a *negative* and *minimum* criterion: it only determines which interpretations conform to the content of the higher-level norm, according to the interpretative conventions accepted by the legal community. But, limited as it is, conformity to the content of the higher-level norm represents the only standard of correction and, therefore, the cognitive element in legal intepretation.

The question of norm content has been obscured by Kelsen himself when recognizing legal relevance just to the normative acts of application / creation of law. Nonetheless, the acts of authorities determining the validity of general or individual norms are, in part, judgements on the conformity of a norm to the content of the higher-level norm. This conformity is neither necessary nor sufficient condition for the validity of a norm, but non conformity to the higher-level norm content is sufficient condition for it to be declared void. This *declaration* is constitutive regarding validity, but it is not regarding correctness.

Anyway, as a matter of fact, the deciding authority could ignore the frame, but not *always* and not *in any case*. This is the second part of my argument (and where Kelsen's thought connects in some way with the hobbesian tradition): conformity to the content of the higher-level norm is a necessary condition for the efficacy the legal system as a whole. The content determination of a norm by the higher-level norm, as we already have seen, is not *ontological* in nature (as there exists norms that do not conform to that content), but –as García Amado has pointed out– *falctual* and *functional*. Legal systems could not fulfill their basic social function of assuring social order and peace –in short, the very possibility of society, which is law basic end in Kelsen's thought– unless it is generally obeyed in all its hierarchical levels. The critics of the tacit alternative clause have seen this; but, why actual legal systems do not faill and collapse? The answer can only be that, mainly, legal authoryties conform to the provisions of the higher-level norms (what regarding content means that they stay within the significant frame). And

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[59] Weyland (1986: 259).

[60] Duncan Kennedy maintains that the initial comprehension of case that determines the applicable norm to the facts can be modified by the practices the he names "strategic behaviour in interpretation"; that a case corresponds to one of the various possible interpretations within the frame is something that is determined by the interpreter (Kennedy, 2008: 155 ff.).

this happens due to *ideological* –namely, what Ross called the "formal legal consciousness"– and *sociological* reasons, as the massive violation of what is socially recogniced as law would indeed leads to the collapse of legal system[61]. So, from the point of view of the legal system as a whole norm content is not irrelvant at all; general efficacy and, with that, the validity of legal systems, depend on that the normative acts of legal authorities are socially recogniced as subjected to law.

[61] García Amado (2006: 1206 ff.). See a larger development of this line of argument in García Amado (1996: 208 ff.).

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